NO. 82-5001

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

WILLIAM ALVIN SMITH,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF BUTTS COUNTY

# BRIEF IN OPPOSITION FOR THE RESPONDENT

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## QUESTION PRESENTED

1.

Whether Petitioner's challenge to the exclusion of a juror pursuant to Witherspoon v. Illinois, 391 U.S. 510 (1968) is properly before this Court?

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## PART ONE

## STATEMENT OF THE CASE

Petitioner, William Alvin Smith, was indicted by the Superior Court of Oglethorpe County during the May Term, 1981 for armed robbery and the murder of Daniel Lee Turner. Following a trial by jury, Appellant was found guilty and sentenced to death for the offense of murder and to life imprisonment for the offense of armed robbery. Petitioner subsequently filed an appeal to the Georgia Supreme Court. The conviction and sentence were affirmed at Smith v. State, 249 Ga. 228 (1982), 290 S.E.2d 43 (1982).

The facts which gave rise to Petitioner's conviction are succinctly set forth in Smith v. State, supra, and because the underlying facts of Petitioner's conviction have no direct bearing upon the legal issues presented on this application for a writ of certiorari, they will not be repeated herein.

## PART TWO
## REASON FOR NOT GRANTING THE WRIT
## ARGUMENT AND CITIATION OF AUTHORITY

### I. PETITIONER'S CHALLENGE TO THE EXCLUSION OF A JUROR PURSUANT TO WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968) IS NOT PROPERLY BEFORE THIS COURT ON THIS PETITION.

In this petition for a writ of certiorari, Petitioner seeks to challenge the exclusion of a juror pursuant to Witherspoon v. Illinois, 391 U.S. 510 (1968). Petitioner asserts, for the first time in any appellate review, that juror Monk was improperly excused for cause. Petitioner contends that in light of the trial Court's charge that regardless of the facts, the jury could reject the death penalty for any reason or no reason, the excluded juror would have been able to obey the Court's instructions and the law, and that thus, the exclusion of juror Monk was not dictated by this Court's holding in Witherspoon v. Illinois, supra.

Petitioner argues that although his appellate counsel did not raise this issue on direct appeal to the Georgia Supreme Court, he is not now barred from raising the issue in the instant petition because, pursuant to the Georgia Unified Appeal Procedure, the Georgia Supreme Court reviewed the record and transcript and found no significant potential of error other than those enumerated by Petitioner's trial counsel.

Respondent asserts that contrary to Petitioner's argument, the review of capital cases by the Georgia Supreme Court pursuant to the Unified Appeal Procedure does not preserve any and all issues for the purpose of appellate review. The Unified Appeal Procedure, as set forth in Ga. Code Ann. § 27-2538, establishes a review procedure for presenting to the sentencing court and to the Georgia Supreme Court all possible challenges to a judgment and sentence. Its purpose is to make certain that all possible matters have been considered by defense counsel so that the record will be complete for all possible challenges. The Unified Appeal Procedure does not act as an automatic appellate review of all challenges; rather, it brings to the attention of counsel and the trial court the existence of any error so that errors may be corrected in a timely manner at the trial level. Thus, the Unified Appeal Procedure, which dictates the use of a series of check lists prior to, during, and after the trial of a capital case, is designed to expose and correct any error at the trial level; its purpose is not for the Georgia Supreme Court to conduct a sweeping and all encompassing review of any issue, whether or not it was raised by appellate counsel.

Rule 17 of the Rules of the Supreme Court of the United States sets forth the considerations governing review on certiorari. This rule indicates that a review on a writ of certiorari is not a matter of right, but of judicial discretion, and the rule sets out three examples that are indicative of the character of reasons for granting a review on a writ of certiorari. Each of these examples are situations where a lower court has decided a federal question. The Rule sets forth no examples of a situation where review on certiorari would be considered when the federal question has neither been presented to nor decided by a lower court.

Additionally, in Cardinale v. Louisiana, 394 U.S. 437, 22 L.Ed.2d 398, 89 S.Ct. 1162 (1969), this Court held that unless it appears on the record that a federal question was both raised and decided in the State Court below, the United States Supreme Court's appellate jurisdiction fails.

Respondent respectfully submits that the sole federal question presented in this petition for a writ of certiorari has never been raised, preserved or passed upon in the Georgia Courts, and that thus, the petition for a writ of certiorari should be denied for lack of jurisdiction.

## CONCLUSION

The Respondent respectfully submits that this Court should refuse to grant a writ of certiorari to the Superior Court of Butts County as it is clear that the federal question presented in this petition has not been presented to or decided by a lower court, and as the decision sought to be reviewed is demonstrably in accord with the decisions of this Court.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, JOHN C. WALDEN, Attorney of Record for the Respondent and a member of the Bar of the Supreme Court of the United States, certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief in Opposition for the Respondent upon Petitioner's attorney by depositing a copy of the same in the United States Mail, with proper address and adequate postage to:

Stephen H. Glickman
Zuckerman, Spaeder, Taylor & Kolker
1201 Connecticut Avenue, N.W.
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This 3rd day of August, 1982.

JOHN C. WALDEN